THE JURORS AND THE JUDGE.

IT is stated, by a learned and accomplished writer, in a book designed for the ethical culture of the bar,[1] that a lawyer is under a moral duty to "support and maintain the court in its proper province wherever it comes in conflict with the coördinate tribunal — the jury." And then, to clinch the argument, the author tells us in scholastic Latin: *ad questiones juris respondeat judices, — ad questiones facti juratores.*[2] In further support of his proposition he reminds us, that, in a multitude of cases, it has been uniformly held that verdicts against the charge of the court with respect to the law, will be set aside without limitation as to the number of times and without regard to the question whether the direction was right or wrong.

The merits of the ethical proposition thus stated may, for the purposes of this essay, be taken as confessed, but the maxim reciting the respective functions of judge and jury opens a wide and inviting field for the legal student.

The maxim, in its earlier form, seems to have been couched in the negative; that is, that the judges should not answer questions of fact nor the jury questions of law,[3] and, as a statement of legal doctrine, it seems to be very ancient. Yet we know that juries *do* answer questions of law, and that, in criminal prosecutions, they have done this for a time whereof the memory of man runneth not to the contrary. Indeed, this doctrine, that juries in the trial of state offences have the right to resolve both the law and the facts by their general verdict, has received the support of the most eminent lawyers on both sides of the Atlantic, and is still considered by many as one of the safeguards of civil liberty. It would seem, therefore, in order to avoid a palpable anomaly, that we should qualify our maxim by excepting from its operation the criminal jurisdiction, and this, in fact, is what modern writers do; but the old form has no exception, nor do the old legists seem to have considered that there was any. Let us direct our atten-

[1] Sharswood, Legal Ethics, 69.

[2] I venture a free translation as follows: All questions of law must be answered by the judges, all questions of fact by the jurors.

[3] The old books give it in this wise: *ad questionem facti non respondent judices, ad questionem legis non respondent juratores.*

tion to this phase of our subject and follow the lines that seem to lead to it.

Of the origin and early history of juries but little is known with certainty, and much that has been said and written respecting them is pure conjecture. While it may be true that the ancient practice of compurgation by friends, or the inquest by sworn recognitors, are the seeds from which the jury developed, it is equally true that neither of these old forms bear any resemblance to the jury as we know it and as it has long been known in our system of legal procedure. Nor can we discern any real evidence of the existence of juries, in the proper sense of the term, prior to the reign of Henry II. It is generally conceded by legal scholars that the Assize of Novel Disseizin, which was instituted by the last named monarch about the year 1177 in order to avoid the wager of battle, is the first true step to jury trials. This gave to a tenant, on a suit for the recovery of lands, in case he did not wish to risk the combat, an alternative of putting himself on the assize; that is, of having the issue tried by four knights summoned by the sheriff and twelve others selected by themselves, all constituting the sixteen recognitors by whose verdict the cause was determined.[1] But it was not until considerable time thereafter that criminal charges became a subject for inquest by juries. The ancient privilege of compurgation by the oaths of friends, "the manifest fountain of unblushing perjury," was abolished during the reign of Henry II. The old ordeals of fire, water, etc., were the methods of defense then generally resorted to, and these methods continued to be employed until in the fourth Lateran Council they were abolished by the Church.[2] This left only the combat. But the combat was available only when a prosecutor came forward to demand it, and so it became necessary to find a substitute for the forbidden ordeals. A variety of expedients were resorted to until finally, during the reign of Henry III, an inquest by a jury came to be a permissible procedure.

It will thus be seen, that, contrary to popular belief, the jury was first impanelled to try the issues in civil causes, and that it was not for a considerable time after its use for this purpose had been established

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[1] See Hallam, Middle Ages, vol. ii, p. 386; 3 Black. Com. c. 10; Palgrave, English Commonwealth, c. 8; Pol. and M., Hist. Eng. Law, vol. i, p. 152.

[2] This event occurred in 1215. The formal abolition of ordeals in England was effected in 1218.

that it was employed in criminal procedure. The jury of Magna Charta, whatever else it may have been, was certainly not the institution which developed during the reign of Henry III, and which constitutes an alleged "bulwark" at the present day. And even the early juries just described only remotely resembled the institution now called by that name. They rendered their verdicts wholly upon the testimony of their own number or upon their own knowledge of the subject-matter of the litigation. Nor does it appear that witnesses were summoned, or that other testimony was received in open court, prior to the reign of Edward III. But about the middle of the fifteenth century the jury, much as we now know it, seems to have become an integral part of the King's courts,[1] and from this time on we have a fair knowledge of its history and functional development.

From what little information we possess concerning the ancient methods of procedure it would seem that in the earlier stages of development, and after the jury had passed from the condition of witnesses to that of triers, the whole matter in controversy was heard and passed upon without the observance of any practical distinction between the law and the facts of the case. During those early years the transactions of the people, requiring legal adjustment, were few and easily understood, while the procedure of the courts, conforming to the rude simplicity of the times, was summary and unartificial. The inquiry was permitted to assume any form that seemed best suited to the exigencies of the particular case and any and all kinds of evidence might be received. But after a time, when, by the progress of civilization, courts assumed a more regular form and controversies became more difficult and complicated, settled rules were established, until finally, during the reign of Henry IV, all evidence was required to be given in open court under the scrutiny of the presiding judge, who was at liberty to admit or exclude it according as its competency or incompetency might appear. From this period we may date the commencement of the modern law of evidence, the examination of witnesses, and the effective work of counsel in the trial of causes.

The rights and duties of jurors changed from time to time with the changes in the character of their office and the development of legal

[1] Fortescue, writing soon after 1450, gives a very vivid picture of the jury of that day and describes it much as we know it at the present time. See De Laud. Leg. Ang., c. 26.

procedure. Originally, being themselves witnesses, they were liable to attaint for a false verdict, and this liability continued long after the reasons which first occasioned it had ceased to exist. For many years — centuries in fact — there was no mode of relief against an erroneous verdict except by the process of attaint. When this was resorted to the case was practically re-tried by a jury of twenty-four and if the verdict was found to be false it was set aside and the jury punished.[1] This falsity, however, might be found in the decision of the law as well as the facts involved in their verdict,[2] nor were they protected from an attaint by following the instructions of the judges in regard to the law, if the instructions turned out to be erroneous.[3] On the other hand, if the jury disregarded the directions of the judge, they were not liable to attaint if they determined the matter of law correctly.[4] But while the jury were thus responsible for any error of law in their general verdict, and consequently had the right to determine it in conformity to their own judgment, yet they might obtain relief against a possible attaint by finding the facts by a special verdict, and, in this way, place upon the record a question of law to be answered by the judges. This they were allowed to do at common law,[5] but because the judges, in some instances, would compel them to return a general verdict, thus subjecting them to the chances of attaint, a statute for their relief was enacted during the reign of Edward I,[6] whereby the privilege of finding a special verdict was confirmed.

But while the jury were thus relieved of the duty of deciding the whole issue, including the legal questions involved, they were not prohibited from so doing. They might still resolve every question if they were willing to assume the risk of attaint. Thus, in the language of the statute, "if they, of their own accord, are willing to say that is a

[1] The punishment seems to have been extremely severe. The jury lost all of their legal freedom, became infamous, and forfeited their goods to the king. Their wives and children were evicted, their houses razed to the ground, their fields destroyed, their bodies cast into prison, and the injured party, against whom the false verdict was given, was restored to his former position. This sentence was ameliorated during the reign of Henry VIII, but as the jurors ceased to be witnesses attaint gradually became obsolete, although it was not formally abolished until 1825.

[2] Medler's Case, Hobart, 227.

[3] Bushell's Case, Vaughn, 145.

[4] Paramore's Case, Dyer, 301.

[5] Dowman's Case, 9 Coke, 12.

[6] Stat. Westminster 2, passed in the year 1285.

disseisin or not, their verdict shall be admitted at their own peril." And this was the rule for many years. Littleton, writing two hundred years after the Act of Westminster 2d, fully recognized the right of jurors, by their general verdict, to determine the law in the issue tried by them,[1] and when Coke published his Institutes in 1628 it would seem to have been well understood that the province of the judges did not extend to the determination of legal questions which arose incidentally out of an issue of fact, but that for their proper decision the jury alone was responsible.

In time, however, mainly by the introduction of special pleading, it became customary to withdraw questions of law from the jury and place them upon the record for determination by the court. Thus, if the pleadings ended in demurrer, an issue of law was raised for the decision of the judges.[2] On the other hand, if they terminated in an issue to the country, it was required to be resolved by the jury. So, too, any question appearing on the record by motion was to be adjudged by the court. In this manner the boundaries of the respective provinces of judges and juries finally came to be marked and distinguished. That is, by the character of the questions which were thus placed upon the record. Nor does it seem that either branch of the triers was allowed to invade the province of the other, and the right of the jury to determine the whole issue committed to them is believed to have been as perfect as that of the judges to decide the issues that were referred to the court. Here, then, we find an explanation of the maxim which constitutes the text of this essay. It had reference to the questions which appeared upon the record, and to these only. The ancient meaning of it was, that the questions of fact thus raised should not be answered by the judges, nor the questions of law by the jurors. But this was its full extent. The doctrine, that questions of law which might incidentally arise in the determination of an issue of fact could be separated from the fact and left to the

[1] See Lit. Ten. § 368.

[2] One of the primary objects of special pleading was to separate the law from the facts for the purpose of submitting the former to the judgment of the court and of leaving the latter to be determined by the jury. If the defendant could not deny the facts on which the suit was founded he was compelled to place his defense upon the record by special plea, and when such was the case the pleading usually ended in demurrer, forming an issue of law for the decision of the court. It is said that under the ancient practice, in the old actions of debt, detinue, covenant, trespass and replevin, a large portion of the questions arising in suits were thus withdrawn from the action of the jury and submitted to the judges for determination.

decision of the court, otherwise than by a demurrer to the evidence or the finding of a special verdict, was wholly unknown. This doctrine, familiar as it now is to us, is yet of comparatively recent origin and has grown out of the modern practice of granting new trials for a difference of opinion between the court and the jury upon questions of law arising on the trial. The first instance of the exercise of this power is in the year 1665. Prior to that time, as the jurors were under no legal responsibility to the judges for the correctness of their decisions, either as to the law or the facts of the case, it follows that they might properly exercise their own discretion in arriving at determinations, and the maxim applied only to the questions of law and fact as they stood upon the record.

But when motions for new trials came to be substituted for the ancient process of attaint, and courts began to set aside verdicts because of a disregard of the opinions of the judge respecting the questions of law involved in the issue, then both judges and juries assumed new relations and the old maxim received a new content. The court having acquired power to revise the decisions of juries, and to order new trials for their neglect or refusal to follow the directions of the judge with respect to matters of law, it became the duty of the jury to comply with such instructions as might be given to them. But, while the boundaries of the respective provinces of judge and jury underwent a marked change, the maxim remained unaltered. As no change was necessary, none was made. It adapted itself perfectly to the new order of things and its binding force and effect was unimpaired. And now, even as in the days of old, in all civil cases questions of law must be answered by the judges; questions of fact by the jurors.

In state trials, however, we still find the jurors exercising their ancient prerogative of resolving both the law and the facts by their general verdict. Why, it may be asked, should there exist this striking difference between the civil and the criminal jurisdiction? In defense of the practice, it has been said, that it is not only in consonance with the true principle of the common law but is peculiarly applicable to a free government where it is advisable that the people should retain in their own hands a large measure of the administration of justice. The exercise of this power, by jurors selected from among themselves, it is urged, furnishes the most effectual security against the possible exercise of arbitrary power by the judges as well

as the best protection of innocence.[1] But this view, however commendable it may seem, does not furnish a satisfactory answer to our question, and for its proper solution we must again refer to the historical development of the jury.

From the earliest glimpse that we are able to obtain of jury trials in criminal actions it appears that the jury had the right to determine, according to their own judgment, the whole issue submitted to them on the general plea of not guilty. That is, they had the right of passing upon the criminality of the fact, as well as upon the fact itself. And this they might do without fear, for attaint lay only in civil cases, it being inconsistent with the spirit of the English constitution to question an acquittal in a criminal proceeding.[2] So, too, the forms of special pleading in civil actions, whereby questions of law were separated from the facts, were never extended to criminal prosecutions. The accused was never compelled to take his defense from the jury and submit it to the court by special justification, but might always put himself on the country for his general deliverance, and after a verdict of not guilty, however much the court might disapprove, it had no power to award a new trial. It was from these reasons, therefore, that the ancient prerogatives of the jury remained intact and to them also must we refer many of the present day doctrines respecting state trials. And it is because of these reasons that our maxim can have no application in criminal proceedings.

The underlying motive that prevented the adoption in criminal prosecutions of the rules of pleading which prevailed in civil actions was undoubtedly a solicitude for the safety of the subject, for, as Blackstone says, "in times of difficulty and danger, more is to be apprehended from the violence and partiality of judges appointed by the crown in suits between the king and subjects, than in disputes between one individual and another to settle the metes and boundaries of private property."[3] Many times have attempts been made by the English judges to encroach upon the rights of jurors in state trials, and to compel them to return verdicts in conformity with directions given. Upon more than one occasion have jurors been fined and imprisoned for a refusal to follow the instructions of the judges.[4] But always have these attempts been stubbornly resisted

[1] State *v.* Wilkinson, 2 Vt. 480.

[2] Reg. *v.* Duncan, 7 Q. B. D. 198.

[3] 4 Black. Com. 349.

[4] One of the earliest efforts of this kind was in the case of Sir Nicholas Throckmorton, who was tried for high treason and found not guilty against the charge of the

and the conflict between the crown, as represented by its judges, and the people, as represented by the jury, forms one of the most interesting chapters in the long struggle for constitutional liberty. It was not until 1670, however, that the right was finally established in the celebrated "Bushell's Case." [1] This grew out of the trial of William Penn and William Mead, for a breach of the peace in addressing a number of persons congregated on one of the streets of London. The court charged the jury strongly against the prisoners, but the jury, disregarding the charge, returned a verdict of not guilty. Thereupon they were immediately fined and committed to prison. Bushell, one of the jurors, refused to obtain a release by paying the fine, and brought a writ of *habeas corpus*. Upon the hearing the court vindicated the right of the jury to determine both the law and the fact by their general verdict, and since this time, until very recent years, the right has been unquestioned.

The independence of juries, thus declared by the judgment in Bushell's Case, became and remained the law of the American colonies and of the states subsequently erected upon them. The principle was embodied in the constitutions of many states, or declared by statutory enactments in others, and the earlier decisions all recognize the right.[2] This power of juries was also a favorite doctrine of the jurists.[3] Indeed, it was not until the year 1835 that a contrary doctrine was announced, when Judge Story held that the jury must follow the instructions of the court in making up their verdict.[4] This holding was followed by the Supreme Court of Massachusetts,[5] and afterward by the courts of some other states. The theory upon which the decision of Judge Story proceeded was, the unfitness of jurors to decide questions of law, and the violation of the harmony of the legal system which the admission of such right occasioned. This has also been the key-note of all subsequent arguments against the exercise of the right. The theory, it will be seen, wholly excludes

court. Before the jury separated they were sent to prison, where they remained several months and from which they were released only after the payment of enormous fines. This occurred in 1554, but instances of the same kind are shown to have happened as late as 1670.

[1] Vaughan's R. 135.

[2] Wharton's State Trials, 88.

[3] See Wilson's Works, vol. ii, p. 215 *et seq.* (Andrew's ed.), for an interesting and instructive discussion.

[4] United States *v.* Battiste, 2 Sum. 240.

[5] Commonwealth *v.* Porter, 10 Met. 263.

the old ideas relative to juries as conservators of the liberty of the citizen and protectors of innocence against the consequences of the partiality and undue bias of judges. In support of this position it is contended that the causes which, in England, rendered the maintenance of the ancient right of juries indispensable to individual safety do not exist in this country, or, at best, operate with but slight force. Hence, it is said, the reason of the right having failed, the right itself should also cease. These views, of late years, have obtained a comparatively wide adherence, and, in the absence of constitutional or statutory recognition of the right, the volume of authority now seems to sustain the doctrine that the jury are not judges of the law in criminal cases.[1]

In many of the states, however, the old rule remains intact. In such states, while it is the duty of the court to aid the jury by instructing them upon all matters of law necessary for a proper determination of the issue,[2] yet the instructions so given do not bind the consciences of the jurors[3] but are regarded merely as an aid in arriving at a correct judgment.[4] At most, it would seem that the jury should give to the instructions a respectful consideration, especially where they are in doubt as to what the law may be,[5] but they may apply the law to the facts of the case according to their own conviction.[6]

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[1] State *v.* Burpee, 65 Vt. 1, and cases cited.

[2] State *v.* Syphrett, 27 S. C. 29.

[3] State *v.* Armstrong, 106 Mo. 395.

[4] State *v.* Zimmerman, 31 Kan. 85.

[5] Bird *v.* State, 107 Ind. 154.

[6] Hooper *v.* State, 52 Ga. 607; Kane *v.* Commonwealth, 89 Pa. St. 522; State *v.* Whitmore, 53 Kan. 343; Spies *v.* People, 122 Ill. 1; State *v.* Lindsey, 19 Nev. 47.